CONTROLLED SUBSTANCE ANALOG STATUTES

Section 101(3) of the Uniform Controlled Substance Act (UCSA) defines controlled substance analog (a copy of which is attached as Exhibit 1 to this memorandum) and Sec. 214 determines how it is to be treated and scheduled (attached as Exhibit 2). At this time, only two states track the language of both Sections 101(3) and 214 of the UCSA – Washington and Wisconsin. Missouri tracks the language of Sec. 101(3), and both Arkansas and Nevada track the language of Sec. 214. In all, 27 states and D.C. address one or both of the relevant sections of the UCSA. They are: AR, CA, CO, DE, D.C., FL, IL, IN, KS, KY, LA, MD, MI, MO, NE, NV, NH, NJ, NM, NC, OK, PA, SC, TX, UT, VA, WA, and WI.

For ease of reference, this memorandum will address each section separately, beginning with Sec. 101(3) of the UCSA defining controlled substance analog. As stated above, Missouri, Washington and Wisconsin track the language of Sec. 101(3) exactly. Nine other states and D.C. include language substantially equivalent to the UCSA definition.

Arkansas: §5-64-414; [Sec. 101(3)(i) & (i)(A)] AR combines these provisions and changes the qualifier "and" between the sections to "or" as follows: "… means a substance: (A) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or Schedule II *or* that has a stimulant, depressant …"

- [Sec. 101(3)(ii)(C)] Changes the language from "… with respect to the substance is *permitted by* the exemption" to "… with respect to the substance is *pursuant to* the exemption."

Colorado: §18-18-102(6)(a) and (b); [Sec. 101(3)(ii)(B)] Adds "… so long as such substance is in its intended and uncontroverted form" to the end of the section.

D.C.: §48-902.14; [Sec. 101(3)(i) & (i)(A)] Makes the "chemical structure substantially similar to" language a separate section but does not include a conjunction between the sections, only a semi-colon to separate them (follows federal language)

- [Sec. 101(3)(i)(A)] Adds "… substantially similar to *or greater than"*

Kansas: §21-5701; [Sec. 101(3)(i) & (i)(A)] Follows D.C. language

- [Sec. 101(3)(i)] Adds the qualifying language of "intended for human consumption" and omits Section 101(3)(ii)(D) as a result.

Kentucky: §218A.010; [Sec. 101(3)(i) & (i)(A)] Makes the "chemical structure substantially similar" language a separate section, but otherwise follows the language of the UCSA

- [Sec. 101(3)(i)(A) & (B)] Adds "… or greater than …" and omits 101(3)(ii)(A) from the exclusions.

Louisiana: §40:961; [Sec. 101(3)(i) & (i)(A)] Follows D.C. language

- [Sec. 101(3)(i)(A) & (B)] adds the "or greater than" language and omits 101(3)(ii)(A) from the exclusions

Michigan: §333.7104; [Sec. 101(3)(i)(A) & (B)] Adds "narcotic" to the list of effects the substance has and adds the " … or greater than …" language.

Missouri: §195.010; exact

Nevada: §453.043; [Sec. 101(3)(i)(B)] Changes from "with respect to a particular *individual*, which *the individual* …" to "with respect to a particular *person*, which *he or she* …"

North Carolina: §90-87; [Sec. 101(3)(i) & (i)(A)] Follows D.C. language

- Adds the following language to the end of the statute: "The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to subdivision 802(34) or 802(35) of Title 21 of the United States Code does not preclude a finding pursuant to this subdivision that the chemical is a controlled substance analogue." (This is included in the federal definition.)

Utah: §58-37-2; Tracks the UCSA definition but omits the conjunction "and" and adds two sections to the end of Sec. 101(3)(ii) as follows:

- "(E) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

"(F) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed

in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act."

Washington: §69.50.101; exact

Wisconsin: §961.01; exact

Three states, **Maryland** (Crim. Law §5-402), **Nebraska** (§28-401) and **South Carolina** (§44-53-110), track the language of Sec. 101(3) with the exception of "medium" changes to the language. All three states omit Section 101(3)(i)(B) from their statutory definitions. Maryland and Nebraska add the "or greater than" language to Sec. 101(3)(i)(A). Nebraska and South Carolina change the conjunction from "and" to "or," and both add the following language to Sec. 101(3)(ii):

> "any substance generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301, et seq." [Note that Nebraska includes "as such act existed on January 1, 2009."]

Additionally, all three states omit Sec. 101(3)(ii)(D).

Nine states have statutes that define controlled substance analog which have substantial changes to the uniform definition as follows:

California: Health and Safety Code §11401; States that a controlled substance analog means either a "substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance classified in Section 11054 or 11055" or "a substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance classified in Section 11054 or 11055." (Basically, it combines parts (3)(i)(A) and (B) into one sub-section but makes it "either" instead of "and.")

- [Sec. 101(3)(ii)(B)] Changes the language as follows: "Any substance for which there is an approved new drug application as defined under Section 505 of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 355) or which is generally recognized as safe and effective for use pursuant to Sections 501, 502, and 503 of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Secs. 351, 352, and 353) and 21 C.F.R. Section 330 et seq."

Florida: §893.0356; Florida uses the similar language for Sec. 101(3)(i)(A) & (B) as California, except that it uses "and" instead of "either." Section 101(3)(ii)(D) is

changed as follows: "any compound, mixture, or preparation which contains any controlled substance which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse."

Illinois: 720 ILCS 570/402 "Possession unauthorized by this Act; penalty"; Definition is as follows: "a substance which is intended for human consumption, other than a controlled substance, that has a chemical structure similar to that of a controlled substance in Schedule I or II, or that was specifically designed to produce an effect substantially similar to that of a controlled substance in Schedule I or II." Includes examples of chemical classes which may provide evidence of an analog.

Indiana: §35-48-1-9.3; [Sec. 101(3)(i)(A) & (B)] Definition as follows: "means a substance: (1) the chemical structure of which is substantially similar to that of a controlled substance included in schedule I or II and that has; or (2) that a person represents or intends to have; a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than …"

- tracks Sec. 101(3)(ii) of the UCSA.

New Hampshire: Title XXX §318-B:1; Definition is as follows: "means a substance that has a chemical structure substantially similar to that of a controlled drug and that was specifically designed to produce an effect substantially similar to that of a controlled drug. The term shall not include a drug manufactured or distributed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of section 505 of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1052 (21 U.S.C. §355)."

New Jersey: §2C:35-2; Definition is as follows: "means a substance that has a chemical structure substantially similar to that of a controlled dangerous substance and that was specifically designed to produce an effect substantially similar to that of a controlled dangerous substance. The term shall not include a substance manufactured or distributed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1052 (21 U.S.C. s.355)." (Very similar to the NH statute.)

New Mexico: §30-31-2(W); NM generally tracks the NJ definition with some changes. Definition is as follows: "means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or that was specifically designed to produce effects

substantially similar to that of controlled substances in Schedule I, II, III, IV or V." Includes examples of chemical classes. Excludes the following: "those substances generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption from investigational use within the meaning of Section 505 of the Federal Food, Drug, and Cosmetic Act."

Oklahoma: 63 Okl.St.Ann. §2-101; contains a definition for "synthetic controlled substance" as follows: "means a substance, whether synthetic or naturally occurring, that is not a controlled dangerous substance, but which produces a like or similar physiological or psychological effect on the human central nervous system that currently has no accepted medical use in treatment in the United States and has a potential for abuse. The court or authority concerned with establishing that the substance is a synthetic controlled substance should consider, in addition to all other factors, the following factors as related to 'representations made' in determining whether the substance is a synthetic controlled substance:

a. statements made by an owner or by any other person in control of the substance concerning the nature of the substance, its use or effect,

b. statements made to the recipient that the substance may be resold for an inordinate profit,

c. prior convictions, if any, of an owner or any person in control of the substance, under state or federal law related to controlled dangerous substances, and

d. the proximity of the substance to any controlled dangerous substance.

Prima facie evidence that a substance containing salvia divinorum has been enhanced, concentrated or chemically or physically altered shall give rise to a rebuttable presumption that the substance is a synthetic controlled substance;"

Texas: Health & Safety Code §481.002; Similar the NH & NJ language except substitute "Schedule I or II or Penalty Group 1, 1-A, or 2" for "Schedule I, II, III, IV or V," and substitute "or" for "and." Does not include exclusions in this statute.

- §481.123, "Defense to Prosecution for Offense Involving Controlled Substance Analogue" includes the exclusions of Sec. 101(3)(ii) with the exception of (3)(ii)(A).

Delaware and Pennsylvania include a definition of "designer drug" in their respective controlled substance statutes that is similar to Sec. 101(3).

Delaware: 16 Del.C. §4701; "designer drug means a substance that has a chemical structure substantially similar to that of a controlled substance or that was specifically designed to produce an effect substantially similar to that of a controlled substance. Examples of chemical classes in which 'designer drugs' are found include, but are not limited to, the following: Phenethylamines, N-substituted piperidines, morphinans, ecgonines, quinazolinones, substituted indoles, and arylcycloalkylamines."

- 2009 DE H.B. 443(NS) proposes to amend §4701(6), definition of "controlled substance" to include "designer drug" as a controlled substance

- Also proposes to amend §4701(9), definition of "designer drug" to exclude "any substance that was manufactured, delivered or dispensed in conformance with an approved new drug application, or an exemption for investigating use within the meaning of §505 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §355), or that was manufactured, delivered, or dispensed in conformance with a registration issued by the Attorney General of the United States within the meaning of §§301-304 of the Federal Controlled Substances Act (21 U.S.C. §§821-824)."

Pennsylvania: 35 P.S. §780-102; "'Designer drug' means a substance other than a controlled substance that is intended for human consumption and that either has a chemical structure substantially similar to that of a controlled substance in Schedules I, II or III of this act or that produces an effect substantially similar to that of a controlled substance in Schedules I, II or III. Examples of chemical classes in which designer drugs are found include, but are not limited to, the following: Phenethylamines, N-substituted piperidines, morphinans, ecgonines, quinazolinones, substituted indoles and arylcycloalkylamines."

- 35 P.S. §780-113(a)(36) makes a misdemeanor "the knowing or intentional manufacture, distribution, possession with intent to distribute, or possession of a designer drug. Nothing in this section shall be construed to apply to a person who manufactures or distributes a substance in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of section 505 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 355). For purposes of this section, no new drug shall be introduced or delivered for introduction except upon approval of an application pursuant to section 505 of the Federal Food, Drug and Cosmetic Act."

Virginia does not have a definition of either "controlled substance analog" or "designer drug," but does include a "designer drug" scheduling provision as follows:

- §54.1-3456; "Any drug not listed on Schedule I or II in this chapter, which is privately compounded, with the specific intent to circumvent the provisions of this chapter, to emulate or simulate the effects of another drug or class of drugs listed on Schedule I or II in this chapter through chemical changes such as the addition, subtraction or rearranging of a radical or the addition, subtraction or rearranging of a substituent, shall be considered to be listed on the same schedule as the drug or class of drugs which it imitates in the same manner as any isomer, ester, ether, salts of isomers, esters and ethers of such drug or class of drugs."

With regard to Sec. 214 of the UCSA, four states track the language of Sec. 214 exactly: **Arkansas**, **Nevada**, **Washington**, and **Wisconsin**. **Kansas** does not include the scheduling language of Sec. 214, but otherwise tracks the language of Sec. 214.

The following states have enacted statutes that treat a controlled substance analog as either a Schedule I or II substance or an equivalent thereof:

California (Health & Safety Code §§11400 & 11401(a) – scheduled as either Schedule I or II)
Colorado (§§18-18-203 & 204 – scheduled as either Schedule I or II)
D.C. (§48-902.14 – treated as Schedule I substance)
Florida (§893.0356 – treated as Schedule I substance)
Illinois (710 ILCS 570/402 – treated as the controlled substance to which it is substantially similar)
Indiana (§35-48-4-0.5 – treated as Schedule I if the substance is intended in whole or in part for human consumption)
Louisiana (§40.964.1 – treated as Schedule I or II)
New Mexico (§30-31-23 – treats them as the same as the substance of which they are an analog for Schedules I, II, III and IV)
Maryland (Crim. Law §5-402 – treated as Schedule I to the extent the substance is intended for human consumption)
Missouri (§195.022 – treated as Schedule I)
Nebraska (§28-401(30) – treated as Schedule I)
North Carolina (§90-89.1 – treated as Schedule I)
Texas (§481.106 – treated as Penalty Group 1, 1-A, or 2)
Virginia (§54.1-3456 – treated as Schedule I or II).

Nine states contain no Sec. 214 equivalent or scheduling statute for controlled substance analogs, but they all have some statute providing for penalties related to controlled substance analogs.

They are: **Delaware**, **Kentucky**, **Michigan**, **New Hampshire**, **New Jersey**, **Oklahoma**, **Pennsylvania**, **South Carolina**, and **Utah**.

The following state controlled substance analog statutes have been challenged as to their constitutionality and found to be valid:

> California: *People v. Silver*, (App. 2 Dist. 1991) 281 Cal.Rptr. 354, 230 Cal.App.3d 389, review denied
> Colorado: *People v. Frantz*, 114 P.3d 34, modified on denial of rehearing, cert. denied

It has also been challenged on the federal level in *U.S. v. Grandberry*, 916 F.2d 1008 (1990), and *U.S. v. Desurra*, 865 F.2d 651 (1989) and found to be constitutional. The United States District Court for the Southern District of New York found the federal statute to be unconstitutionally vague, but that ruling was reversed in the case of *U.S. v. Roberts*, 363 F.3d 118 (2004). The main issue seems to be whether to interpret the statute in the conjunctive or disjunctive. Per the Court of Appeals:

> Under the disjunctive reading, a substance that satisfies one or more of the subsections is a "controlled substance analogue." According to the conjunctive reading, the definition requires two things: first, (i) that the substance be chemically similar and, second, (ii) that it have a similar or greater psychopharmacological effect or (iii) that it be intended to have or be represented as having such an effect.

Roberts at 120.

Note that the federal statute differs from the UCSA model language in that it makes the "chemical structure of which is substantially similar to" language a separate section and does not include a conjunction between the first two sections, only a semi-colon, which leads to the arguments regarding how it should be interpreted, conjunctively or disjunctively. Where the issue has arisen, the courts have construed the statute to read disjunctively, i.e., with an implied "or." This will only be an issue for those states that include neither "and" nor "or" in their controlled substance analog statute. Currently, only Kansas, Louisiana, North Carolina, Utah and D.C. follow the federal statute and omit the conjunction.

Uniform Controlled Substances Act (1994)

Section 101. Definitions.

(3) (i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in or added to Schedule I or II and:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; or

(B) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or II; but

(ii) the term does not include:

(A) a controlled substance;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355] to the extent conduct with respect to the substance is permitted by the exemption; or

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

EXHIBIT 1

SECTION 214. Controlled Substance Analog Treated as Schedule I Substance.

A controlled substance analog, to the extent intended for human consumption, must be treated, for the purposes of this [Act], as a substance included in Schedule I. Within [ ] days after the initiation of prosecution with respect to a controlled substance analog by indictment or information, the [prosecuting attorney] shall notify the [appropriate person or agency] of information relevant to emergency scheduling as provided for in Section 201(g). After final determination that the controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may be commenced or continued.

EXHIBIT 2